

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LINDA SCHMIDT-REINKE,

Claimant,

v.

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2007-025100

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

FILED 11/21/2012

INTRODUCTION

In June 2011, Claimant, Linda Schmidt-Reinke, settled her claims arising from a 2007 industrial accident against her time of injury employer, Portneuf Medical Center (Employer), and against State of Idaho, Industrial Special Indemnity Fund (ISIF), via lump sum settlement agreements. The Industrial Commission subsequently approved Claimant's mediated settlement agreement with her Employer, but rejected the mediated settlement agreement between Claimant and ISIF. Claimant and ISIF then prepared for hearing.

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Pocatello, Idaho on February 17, 2012. Claimant was present in person and represented by James D. Ruchti, of Pocatello, Idaho. Defendant ISIF was represented by Paul B. Rippel, of Idaho Falls, Idaho. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on August 14, 2012.

ISSUES

The issues to be decided were narrowed by the parties during briefing and are:

1. Whether Claimant is estopped from asserting that her industrial accident caused permanent impairment.
2. Whether ISIF is liable pursuant to Idaho Code § 72-332.
3. Apportionment under the Carey Formula.

CONTENTIONS OF THE PARTIES

ISIF acknowledges that Claimant suffered an industrial accident when she fell from a chair at work on July 20, 2007, and is now totally permanently disabled. Claimant asserts that her 2007 industrial accident caused her permanent impairment which combined with her pre-existing lumbar disc disease to render her totally and permanently disabled. ISIF maintains that Claimant is collaterally estopped by her settlement agreement with her Employer from asserting that her industrial accident caused any permanent impairment. ISIF also contends that even if not so estopped, Claimant's total permanent disability is due to the progression of her pre-existing degenerative lumbar disc disease. ISIF asserts that Claimant has failed to prove that her accident caused any permanent impairment, and hence did not combine with her pre-existing condition to render her totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken November 30, 2010;
3. The testimony of Claimant, George G. Colvill, and Roxie Lammers taken at the February 17, 2012 hearing;

4. Joint Exhibits 1-27, admitted at the hearing;
5. The post-hearing deposition of Bart William McDonald, MPT, taken by Claimant on March 15, 2012;
6. The post-hearing deposition of Benjamin Blair, M.D., taken by Claimant on April 4, 2012;
7. The post-hearing deposition of David B. Verst, M.D., taken by ISIF on May 11, 2012;
8. The post-hearing deposition of Nancy J. Collins, Ph.D., taken by Claimant on May 22, 2012;
9. The post-hearing deposition of Kathy Gammon, CRC, MSPT, taken by ISIF on June 1, 2012; and
10. The “Stipulation and Agreement for Lump Sum Settlement and Order of Approval and Discharge” between Linda Schmidt-Reinke and Portneuf Medical Center approved by the Commission on August 5, 2011, of which the Referee takes official notice.

All objections posed during the depositions are overruled and all motions to strike therein are denied.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1946. She was 66 years old and had resided in Pocatello for approximately 25 years at the time of the hearing. Claimant graduated from high school in Pocatello in 1964. In 1969 she graduated from college with a degree in medical technology.

Thereafter she worked in medical-related positions in Texas, Colorado, and California before returning to Pocatello in 1986.

2. In 1986, Claimant began working at the Bannock Regional Hospital blood bank. In 2000, she became the coordinator and supervisor of the blood bank. Bannock Regional Hospital merged with another provider and became Portneuf Medical Center.

3. As blood bank coordinator, Claimant supervised four full-time employees and managed all procedures required to provide safe blood products for patients. She coordinated supplies with other blood banks, oversaw quality control, prepared for inspections, and responded to trauma cases by pushing carts of blood products to the hospital emergency and surgery rooms. Her duties included physically lifting, packing, and moving reagents, ice and blood products. She regularly lifted more than 25 pounds.

4. In late 2000, Claimant noted minor incontinence. She underwent a hysterectomy and bladder repair and the incontinence resolved.

5. In April 2001, Claimant began noticing sharp back pain, radiating into her leg. She had no bowel or bladder symptoms. She came under the care of orthopedic surgeon Benjamin Blair, M.D. A lumbar MRI revealed fairly significant stenosis at L4-5 and left-sided herniated disc at L5-S1. Dr. Blair initially prescribed medications and later provided epidural steroid injections. These measures provided only temporary relief. Lumbar surgery was recommended. During pre-operative testing in 2002, Claimant was diagnosed with diabetes mellitus. Thereafter, she managed her diabetes with oral medication.

6. On April 24, 2002, Dr. Blair performed L4-5 laminectomy and L5-S1 discectomy. Claimant recovered from surgery and resumed her usual full-time work duties by July 2002.

7. In 2004, Claimant's low back pain returned. She felt pain in her lower back from her waist down. In June 2004, she sought further medical treatment from Dr. Blair. He prescribed narcotic medications for her back pain.

8. Claimant attempted to manage her back pain with prescription narcotics. Her back pain was persistent, some days were worse than others. She guarded her back by adjusting her lifting techniques. She took days off from work, including several days at a time, when her back pain intensified. She increasingly delegated the physically demanding aspects of her work duties to other employees. She asked for help from co-workers when lifting and avoided strenuous duties. She went home from work on her lunch hour and used a heating pad to ease her back pain. She tolerated sitting for one to two hours. Claimant's medication usage increased from one pill as needed, to one or two per day. She took her pain medication at night after finishing work and a prescription muscle relaxer each morning.

9. On January 30, 2006, Dr. Blair wrote a letter indicating that Claimant's back condition when markedly aggravated might require her to miss work occasionally for one or two days.

10. Claimant's back pain affected her life at home; however, she was still able to keep her home clean, shop, socialize, camp, vacation, and care for her children. She had no permanent work restrictions from any physician and was able to perform her job functions. She was able to travel long distances, but only with increased pain. She sometimes had difficulty sleeping due to pain, although she usually slept adequately.

11. On July 20, 2007, Claimant was at work holding a box of blood products in her arms. She attempted to sit down in a chair, which slipped out from under her. She fell to the hardwood floor, landing on her buttocks. She noted immediate intense lumbar and sacral pain.

Initial x-rays revealed no fractures and she sought treatment from Dr. Blair for her increased pain. He encouraged her to wait and see whether her pain would subside. Her increased pain continued and an MRI disclosed an occult sacral fracture. She was treated conservatively.

12. In August 2008, Claimant underwent an MRI which showed extensive lumbar pathology, including L4-5 spondylosis and spondylolisthesis with resulting stenosis, and L2-3 disc herniation. On September 4, 2008, Claimant reviewed the MRI with Dr. Blair and told Dr. Blair that she could not continue working given the intensity of her back pain. Dr. Blair agreed. Claimant resigned her position that same day. She loved her job and her friends were her co-workers. She had no other source of income at the time she resigned, but resigned because she could no longer tolerate the pain. Dr. Blair later testified that Claimant was unable to work from September 2008 onward.

13. In December 2008, Claimant underwent a functional capacity evaluation (FCE) which documented significant physical limitations. Dr. Blair opined Claimant's subjective complaints were consistent with the limitations found on the FCE. On December 18, 2008, after reviewing the FCE, Dr. Blair opined that Claimant was permanently disabled from meaningful work related activities.

14. Claimant's occult sacral fracture eventually healed entirely. However her increased back pain persisted. Before her accident, Claimant had nagging, but not entirely debilitating back pain. After the accident she had constant unrelenting back pain which was aggravated by any activity and decreased only with rest and heat.

15. Following her 2007 accident, Claimant developed urinary incontinence. She attributes this incontinence to her industrial accident, although no physician has so opined.

16. On May 21, 2009, Dr. Blair opined that Claimant was not medically stable. Additional epidural steroid injections were provided.

17. On July 27, 2009, Claimant was examined by David Verst, M.D., Gerald Moress, M.D., and Michael Enright, Ph.D., at Employer's request. Drs. Verst and Moress diagnosed degenerative lumbar disc disease and chronic pain syndrome. Drs. Verst and Moress also found that Claimant had reached maximum medical improvement and concluded that she had recovered from her industrial accident without any permanent impairment. They opined that Claimant suffered permanent impairment of 17% of the whole person due to her pre-existing diabetes. Dr. Enright concluded that no psychological or behavioral factors impacted her reported pain.

18. On September 10, 2009, Dr. Blair found Claimant had reached maximum medical improvement and was medically stable. Dr. Blair disagreed with some of Dr. Verst's and Dr. Moress' conclusions. Dr. Blair reaffirmed his opinion that Claimant's 2007 accident permanently aggravated her pre-existing lumbar condition and rated her permanent impairment at 12% of the whole person with 50% attributable to her pre-existing lumbar condition and 50% attributable to her 2007 industrial accident.

19. Vocational expert Nancy J. Collins, Ph.D., evaluated Claimant's employability and opined that she is totally and permanent disabled. Kathy Gammon, CRC, MSPT, evaluated Claimant's employability and ultimately determined that Claimant may be totally permanently disabled. Dr. Blair and Dr. Verst also concluded that Claimant is totally and permanently disabled.

20. At the time of the hearing, Claimant was receiving Social Security Disability benefits and continued to suffer significantly increased back pain.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 7

21. Having observed Claimant at hearing and compared her testimony with other evidence in the record, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

22. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

23. **Collateral estoppel.** As a threshold matter, ISIF notes that the finding that Claimant suffered an injury to her sacrum due to her industrial accident was an issue actually and necessarily decided in her settlement agreement with Employer. ISIF argues that Claimant is collaterally estopped by her settlement agreement with Employer from now asserting that her 2007 industrial accident also caused permanent impairment to her lumbar spine.

24. Collateral estoppel applies to issues actually and necessarily decided in prior litigation. Brown v. Industrial Special Indemnity Fund, 138 Idaho 493, 65 P.3d 515 (2003). Claimant's 2011 settlement agreement with Employer, having been approved by the Commission, constitutes a final judgment on the merits for purposes of collateral estoppel. Jackman v. Industrial Special Indemnity Fund, 129, Idaho 689, 931 P.2d 1207 (1997). In the settlement agreement, Claimant and Employer both acknowledged a sacral injury due to Claimant's industrial accident as follows: "On July 20, 2007, Claimant sustained an accident, injury, or occupational disease arising out of and in the course of her employment with

employer, resulting in bodily injuries as follows: sacral fracture.” Lump Sum Settlement p. 5, paragraph IX.

25. While paragraph IX only lists a sacral fracture, in that same Lump Sum Settlement, Claimant also alleged that her accident caused permanent impairment by aggravation of her pre-existing low back condition as follows:

CLAIMANT’S CONTENTIONS

Claimant contends and states to the Commission that she fell off a chair and onto her tailbone at work in 2007, and has suffered increased low back pain and disability since that time. She concedes she had a prior non-industrial low back injury, to include surgery in 2002; however, due to the 2007 industrial accident, she can no longer work at her time of injury job due to pain and limitation. Dr. Benjamin Blair, her treating physician, opined she has a 12% whole person impairment, with 50% pre-existing, and 50% due to aggravation of her pre-existing condition by the industrial accident. Her vocational expert, Nancy Collins, PhD, opined Claimant is totally and permanently disabled due to the combination of her pre-existing low back problems and her industrial injury.

Stipulation and Agreement for Lump Sum Settlement and Order of Approval and Discharge, p. 5, paragraph X (emphasis supplied).

26. The same settlement agreement then recites Employer’s contention that Claimant sustained no permanent aggravation to her lumbar spine from her industrial accident. Claimant and Employer then compromised their dispute regarding whether the condition for which Claimant sought benefits was caused her industrial accident or whether the condition was caused by her pre-existing condition.

27. Thus Claimant clearly asserted against Employer her allegation of a permanent lumbar injury from her industrial accident. She is not precluded from asserting it herein simply because both Claimant and Employer acknowledged a sacral injury from the accident. Regarding Claimant’s alleged lumbar impairment, what was actually and necessarily decided in the settlement agreement was that Claimant asserted such and Employer denied such, and both

parties agreed to compromise their dispute regarding precisely this issue for a sum certain, without a finding for or against either party on this very issue. Claimant now asserts the same allegation against ISIF that she asserted against her Employer in the settlement agreement. She has not changed her position.

28. Claimant is not collaterally estopped from asserting in the present case that she suffered a permanent lumbar impairment due to her 2007 industrial accident.

29. **Idaho Code § 72-332 liability.** The next issue is whether ISIF bears any liability pursuant to Idaho Code § 72-332. Idaho Code § 72-332(1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

30. Idaho Code § 72-332(2) further provides that “permanent physical impairment” is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

31. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court identified four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317.

32. Pre-existing, manifest impairments. The pre-existing physical impairments at issue herein are those to Claimant's low back prior to her 2007 industrial accident and her pre-existing diabetes. There is no dispute that her low back condition existed and was manifest in 2002, as documented by her lumbar surgery. Dr. Blair effectively opined that Claimant's pre-existing lumbar impairment totaled 6% of the whole person. Dr. Verst and Dr. Moress rated Claimant's pre-existing lumbar impairment at 7% of the whole person. Claimant's low back condition constitutes a pre-existing condition for purposes of Idaho Code § 72-332 because it preexisted and was manifest prior to her 2007 industrial accident.

33. Claimant's pre-existing diabetes was also manifest prior to her 2007 accident. She was first diagnosed with diabetes mellitus shortly prior to her 2002 lumbar surgery. After examining Claimant in 2009, Drs. Verst and Moress concluded that Claimant suffered permanent impairment of 17% of the whole person due to her pre-existing diabetes and resulting peripheral neuropathy, including her neurogenic bowel and bladder autonomic condition.

34. The first and second prongs of the Dumaw test have been met as to Claimant's pre-existing lumbar condition and diabetes.

35. Hindrance or obstacle. The third prong of the Dumaw test considers "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the

particular claimant.” Archer v. Bonners Ferry Datsun, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990).

36. Claimant underwent lumbar surgery in 2002. She later returned to work; however by 2004, she developed significant ongoing back pain. She delegated her more physically demanding duties to others whom she supervised. She obtained a letter from Dr. Blair in January 2006, indicating that she would need to take occasional time off from work due to aggravations of her back pain. Between 2004 and 2007, Claimant’s pre-existing low back condition compelled her to largely avoid lifting and request help from co-workers. The record establishes that Claimant’s pre-existing low back impairment constituted a hindrance to her employment.

37. Although Claimant’s diabetes pre-existed her industrial accident, the record contains no persuasive evidence that her diabetes hindered her employment. To the contrary, Claimant managed her diabetes with oral medication and testified that it did not bother her in performing her job prior to the 2007 industrial accident. Claimant’s pre-existing diabetes has not been shown to be a hindrance or obstacle to her employment for purposes of Idaho Code § 72-332.

38. The third prong of the Dumaw test is met as to Claimant’s pre-existing lumbar condition, but not as to her pre-existing diabetes.

39. Combination. Finally, to satisfy the “combines” element, the test is whether, but for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of that injury. This test “encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment.” Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

40. ISIF argues that Claimant's 2007 industrial accident produced no permanent impairment; rather, her pre-existing degenerative disc condition progressed to the point where it alone became totally disabling without combining with her 2007 industrial accident.

41. Implicit in the element of combination, is the requirement that the industrial accident cause permanent impairment. An industrial injury from which a claimant fully recovered without any residual complaints would add nothing to that claimant's disability. To establish impairment from an industrial accident a claimant must prove not only that she suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports such a claim to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

42. In the present case, Dr. Blair opined that Claimant's 2007 industrial accident produced permanent lumbar impairment. Dr. Blair opined that she has a 12% whole person impairment, with 50% pre-existing, and 50% due to aggravation of her pre-existing condition by the industrial accident. Dr. Blair disagreed with Dr. Verst's and Dr. Moress' conclusion that Claimant suffered no permanent impairment from her industrial accident. He based his opinion on the 10 years of his treatment of Claimant's symptoms and the marked persisting increase of her symptoms as documented by her treatment pattern since the time of her industrial accident. When asked specifically whether Claimant's 2007 accident caused the L2-3 disc bulge first appearing in post-accident MRI scans, Dr. Blair opined her fall could jar that area of her spine

and “it is definitely possible” but declined to offer a conclusive opinion on the matter. Blair Deposition, p. 72, l. 13.

43. Dr. Verst and Dr. Moress examined Claimant on July 27, 2009, and concluded that she suffered no permanent detriment from her 2007 industrial accident. In his post-hearing deposition, Dr. Verst readily admitted that Claimant is totally and permanently disabled but reaffirmed that her 2007 industrial accident did not cause any permanent impairment. He noted the abundant evidence of Claimant’s pre-existing degenerative lumbar disc disease and testified that no objectively measurable difference existed between MRI’s taken before and after her 2007 accident. Dr. Verst therefore concluded that Claimant had suffered no permanent worsening or impairment of her lumbar spine due to her industrial accident. However, during his deposition, Dr. Verst testified:

A. But an injury can do one of two things. It can take a dormant condition and turn it into an alive, very painful, acute condition. The second is that it can take a chronic degenerative condition and turn it into an acute, painful condition.

Q. And will those—will that increased pain be shown, or observable on diagnostic tests?

A. No, it will not.

Q. Will the worsened condition be observable on diagnostic tests? I imagine in some cases it will be, and others it won’t.

A. That’s correct. But generally, though, with degenerative disk disease—and say it’s severe, it’s been chronic, it’s been there for a long time—if you introduce an acute event in this chronic condition, generally it does not show on any kind of diagnostic testing that there’s been a change.

Q. So how would you know there’s been a change? Wouldn’t it be subjective complaints from patients?

A. That’s correct. It’s based on clinical evaluations and subjective complaints.

Verst Deposition, p. 20, ll. 2-22 (emphasis supplied).

44. Thus Dr. Verst expressly acknowledged that an acute event can take chronic degenerative disk disease and turn it into an acute painful condition as evidenced by a patient's subjective complaints but generally without any observable change on diagnostic testing. Dr. Verst also expressly acknowledged that an injury at the coccyx/sacrum juncture could exacerbate a low back condition. He opined that Claimant's accident did not cause her bladder incontinence or sexual dysfunction, but that her diabetes contributes to her autonomic dysfunction and resulting incontinence.

45. Claimant and ISIF both argue that Claimant's increasing use of prescription narcotic medications for pain control supports their stated position: that Claimant's industrial accident caused increased back pain or that Claimant's degenerative disc condition caused increased back pain. The reality of Claimant's increased back pain is well established by the medication logs and other evidence. However, the cause of her increased back pain is not well illuminated by this evidence, and the phenomena of sensitization arising from her prolonged use of prescription narcotics would appear to operate regardless of the cause of her increased pain.

46. Dr. Blair's causation opinion rests in part upon his observations as Claimant's treating physician and surgeon over a period of 10 years, including his knowledge of her change in subjective complaints. As previously noted, Claimant is a credible witness. Her subjective complaints, including her complaints of increased persisting low back pain following her 2007 accident, are credible. Dr. Blair's opinion that Claimant's 2007 accident caused permanent low back impairment is more persuasive than that of Dr. Verst and Dr. Moress. Claimant has proven that her 2007 industrial accident permanently aggravated her pre-existing lumbar condition causing permanent lumbar impairment.

47. The record contains persuasive evidence that Claimant's pre-existing lumbar condition combined with her 2007 industrial injuries to render her totally and permanently disabled. As noted above, Claimant's pre-existing lumbar condition limited her lifting and working abilities. Her 2007 industrial accident permanently increased her lifting and working limitations. Dr. Blair opined that Claimant is totally and permanently disabled due to her lumbar condition, half of which he attributed to her pre-existing lumbar condition and half to her industrially caused lumbar condition. Dr. Collins, Claimant's vocational expert, testified that Claimant's pre-existing lumbar condition combined with her 2007 accident to produce her total permanent disability.

48. ISIF does not argue, and there is no persuasive evidence, that Claimant's 2007 industrial accident alone rendered her totally and permanently disabled. Rather, the weight of the evidence establishes that Claimant's 2007 industrial accident combined with her pre-existing lumbar impairment to render her totally and permanently disabled. The final prong of the Dumaw test has been satisfied as to Claimant's pre-existing lumbar impairment.

49. Claimant has proven that ISIF is liable for her pre-existing lumbar impairment and the proportion of disability attributable thereto, pursuant to Idaho Code § 72-332.

50. **Carey apportionment.** In Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), the Idaho Supreme Court adopted a formula apportioning liability between ISIF and the employer/surety at the time of the final industrial accident. The formula prorates the non-medical portion of disability between the employer/surety and the ISIF in proportion to their respective percentages of responsibility for the physical impairment. Conditions arising after the injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. Horton v. Garrett

Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

51. Before applying the Carey formula, the portion of Claimant's impairment pre-existing her 2007 industrial accident, and the portion caused by her 2007 industrial accident must be quantified.

52. Dr. Blair opined that Claimant's pre-existing lumbar impairment totaled 6% of the whole person. Drs. Verst and Moress rated Claimant's pre-existing lumbar impairment at 7% of the whole person. However, Dr. Blair's opinion is accorded greater weight as Claimant's treating physician and surgeon with ten years of direct patient observation.

53. Claimant's qualifying pre-existing impairment totals 6% of the whole person for her lumbar condition, as found by Dr. Blair. Claimant's impairment due to her 2007 industrial accident also totals 6% of the whole person for the aggravation of her lumbar condition, as found by Dr. Blair. Thus, Claimant's permanent impairment for Carey apportionment totals 12% (6% due to her 2007 accident, and 6% qualifying pre-existing). Claimant's 2007 impairment constitutes 50% (6/12), and her qualifying pre-existing impairment constitutes 50% (6/12) of her total impairment.

54. By application of the Carey formula, ISIF is responsible for the pre-existing medical portion of 6% impairment and for 50% of the nonmedical portion of Claimant's permanent disability. Drs. Verst, Moress, and Enright found that Claimant had reached medical stability on July 27, 2009. Dr. Blair agreed with this conclusion in his deposition. Thus, ISIF is responsible for payment of full statutory benefits commencing at the conclusion of 250 weeks after July 27, 2009, the date Claimant became medically stable after her 2007 industrial accident.

CONCLUSIONS OF LAW

1. Claimant is not collaterally estopped from asserting in the present case that she suffered a permanent lumbar impairment due to her 2007 industrial accident.
2. Claimant has proven that ISIF is liable for her pre-existing lumbar impairment and the proportion of disability attributable thereto, pursuant to Idaho Code § 72-332.
3. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: ISIF is responsible for payment of full statutory benefits commencing at the conclusion of 250 weeks after July 27, 2009, the date Claimant became medically stable after her 2007 industrial accident.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 16th day of November, 2012.

INDUSTRIAL COMMISSION

_____/S/_____
Alan Reed Taylor, Referee

ATTEST:

_____/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JAMES D RUCHTI
275 S 5TH AVE STE 140
POCATELLO ID 83201-6410

PAUL B RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

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_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LINDA SCHMIDT-REINKE,

Claimant,

v.

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2007-025100

ORDER

FILED 11/21/2012

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant is not collaterally estopped from asserting in the present case that she suffered a permanent lumbar impairment due to her 2007 industrial accident.
2. Claimant has proven that ISIF is liable for her pre-existing lumbar impairment and the proportion of disability attributable thereto, pursuant to Idaho Code § 72-332.
3. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: ISIF is responsible for payment of full statutory benefits commencing at the conclusion of 250 weeks after July 27, 2009, the date Claimant became medically stable after her 2007 industrial accident.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 21st day of November, 2012.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

R. D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

JAMES D RUCHTI
275 S 5TH AVE STE 140
POCATELLO ID 83201-6410

PAUL B. RIPPEL
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ge

_____/s/_____